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NO. 463

In the Supreme Court of the United States

OCTOBER TERM, 1931

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

BRIEF OF APPELLANT

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NO. 463

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OCTOBER TERM, 1931

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

BRIEF OF APPELLANT

The Official Report of the Opinions Delivered in the Courts Below.

DISTRICT COURT:

New State Ice Company vs. Liebmann, and Southwest Utility Ice Company vs. Liebmann, Nos. 1107, 1108, 42 Fed. (2d) 913 (R. 9-19).

CIRCUIT COURT:

New State Ice Company vs. Liebmann, and Southwest Utility Ice Company vs. Liebmann, Nos. 405, 406, 52 Fed. (2d) 349 (R. 46-57).

Jurisdiction

The appellant, pursuant to paragraph 1 of rule 12 of this Court, filed its statement showing the basis on which it

contends that this Court has appellate jurisdiction to review, on appeal, the judgment and decree of the Circuit Court of Appeals. There was drawn in question in that court the validity of a statute of the State of Oklahoma, on the ground of its being repugnant to the Constitution of the United States, and the decision of that court was against its validity. The appellant claimed and asserted rights under that statute, and the appellee challenged the validity thereof as being repugnant to the Constitution of the United States, and the appellant has the right, on appeal here, to have the judgment and decree of the Circuit Court of Appeals reviewed under 28 U. S. C. A., Section 347 (b) (Judicial Code, Section 240, as amended by Act of February 13, 1925).

STATEMENT OF THE CASE

This is an appeal by the appellant from a final judgment and decree of the United States Circuit Court of Appeals for the Tenth Circuit affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, and holding invalid, as being repugnant to the Constitution of the United States, the Act of the Legislature of the State of Oklahoma approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma, 1925), declaring the manufacture, sale and distribution of ice to be a public business and placing the same under the jurisdiction

of the Corporation Commission, giving that Commission the power, upon a hearing, to issue a permit or license, providing for a license fee and a penalty for the manufacture, sale and distribution of ice without securing a permit or license as provided for therein.

We shall hereafter refer to this act as the "Ice Act." The applicable provisions of this act appear in the record here at pages 46 to 48 and, for the convenience of the Court, we set out the act in full, omitting the title and date of approval:

"Ice—Manufacture and Distribution:

"Section 1. That the manufacture, sale and distribution of ice within the State of Oklahoma is hereby declared to be a public business, as defined by Section 11032, of the Compiled Statutes of Oklahoma.

"Corporation Commission—License:

"Section 2. That no person, persons or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission of the State of Oklahoma. The license fee hereunder shall be the sum of fifty cents (50 cents) per ton, per annum, of the daily capacity of ice manufactured, sold or delivered, but the minimum license shall be five dollars ($5.00).

"Same—Hearing:

"Section 3. That the Corporation Commission shall not issue license to any person, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within the State, except upon a hearing had by

said Commission at which said hearing competent testimony and proof shall be presented showing the necessity for the manufacture, sale and distribution of ice, or either of them, at the point, community or place desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant (*sic*) for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities and services to be afforded the public; provided, that nothing herein shall operate to prevent the licensing of any person, firm or corporation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State, whose license shall be granted and issued by said Commission upon application of such person, firm or corporation and payment of license fee.

"Hearings—Written Applications:

"Section 4. No hearing as aforesaid shall be had by said Commission except upon written application of the person, firm or corporation applying for said license, which said application shall set forth the name of the person, firm or corporation applying for said license; the city, town or place it is desired to engage in the manufacture, sale or distribution of ice, or either of them; the amount of ice, based on daily tonnage, it is desired to manufacture, sell or distribute therein; the amount of capital to be invested in said undertak-

ing and facts which will show the public need therefor. Upon receipt of said application the Commission shall make an order setting said application down for hearing at a date not less than fifteen (15) nor more than thirty (30) days from the date said application was received and shall give notice of such hearing by mailing a notice thereof to the town or city clerk of the town named in said application wherein it is desired to engage in said business at least ten (10) days prior to the date of said hearing and by publication in some newspaper of general circulation published in said town, city or community at least ten (10) days prior to the date of said hearing. If there be no newspaper published in said town, city or community, then said publication shall be had in some newspaper published elsewhere in the state and of general circulation in said town, city or community.

"Corporation Commission—Powers:

"Section 5. That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the affording of all reasonable conveniences, facilities and service, as it may impose as to the transportation and transmission companies.

"Same—Orders:

"Section 6. All and any orders made by said Commission fixing rates, charges, rules and regulations as

to any person, firm or corporation engaged in the manufacture, sale and distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma.

"License—Engaging in Business Without:

"Section 7. Any person, firm or corporation who shall engage in the business of manufacturing, selling or distributing ice or engage in either of said businesses, without first obtaining a license, provided for herein, shall be guilty of a misdemeanor and any such person shall be punishable by a fine not to exceed twenty-five dollars ($25.00), and each day's violation shall constitute a separate offense; provided, the Corporation Commission is hereby authorized to promulgate general orders not in conflict with this Act, and to enforce such orders against any person, firm or corporation manufacturing, selling or distributing ice or engaging in either of said businesses, by imposing a fine for the violation thereof not to exceed five hundred dollars for each of said violations.

"Complaints—Hearings:

"Section 8. Any person, persons or corporation aggrieved by any rate, or service, may file an application for a hearing under the terms and conditions of this Act.

"Repealing Clause:

"Section 9. All laws and parts of laws in conflict herewith are hereby repealed."

Section 1 of this Act makes the manufacture, sale and distribution of ice a public business as defined by Section 11032 of the Compiled Statutes of Oklahoma, and this section is:

"11032. Public Business Defined: Whenever any business, by reason of its nature, extent or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price, or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

This section is from Chapter 90, Compiled Oklahoma Statutes 1921, entitled "Trusts and Pools," and the same is set out in full in the appendix, and hereinafter referred to as "Chapter 90." The original act, entitled "Trusts," was passed by the Legislature of the State of Oklahoma and approved June 10, 1908, Session Laws of Oklahoma, 1907-08, page 750, which act is likewise set out in the appendix and hereinafter referred to as the "Original Act." Section 1 of this act provides:

"That every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal."

This is the same as Section 11017 of Chapter 90. Section 13 of the Original Act is the same as Section 11032 of Chapter 90.

The Original Act was carried forward into the Compiled Statutes of Oklahoma, 1909, as Chapter 113, entitled, "Trusts and Combinations." Sections 8800 and 8812, respectively, of this chapter are the same as Sections 11017 and 11032, respectively, of said Chapter 90. Said Original Act was also carried forward in the Revised Laws of Oklahoma, 1910, as Chapter 79, entitled, "Trusts and Pools," and Sections 8220 and 8235, respectively, of this Chapter are the same as Sections 11017 and 11032, respectively, of said Chapter 90.

The appellant complied with the terms and provisions of said Ice Act and obtained from the Corporation Commission a license or permit to manufacture, sell and distribute ice in Oklahoma City, Oklahoma, under the terms and provisions thereof, and was engaged in the manufacture and sale of ice in said city under said license or permit on March 31, 1930, the date of the commencement of this action in the District Court of the United States for the Western District of Oklahoma, and is now and ever since has been so engaged. On and prior to March 31, 1930, the appellee was preparing to engage in the manufacture, sale and distribution of ice in Oklahoma City without complying with said act and in violation thereof.

On March 31, 1930, the appellant herein commenced this action in the trial court against the appellee, seeking to enjoin him from engaging in the manufacture, sale and distribution of ice in said city without complying with said Ice Act. Its complaint appears in the record at pages 1 to 4. The appellant, in its complaint, alleges that said permit or license issued to it by the Corporation Commission for the manufacture, sale and distribution of ice under the provisions of said Ice Act constitutes and is a franchise property right; that it has invested in the business of the manufacture and sale of ice in Oklahoma City under said license or permit a sum in excess of $500,000.00; that the appellee has acquired a site in Oklahoma City for the construction and operation of an ice plant thereon for the manufacture, sale and distribution of ice within said city, and, on February 10, 1930, obtained a building permit from the city authorities for the construction of said building; that shortly thereafter he commenced the building and construction of said plant upon said site for the manufacture, sale and distribution of ice, and is engaged in the process of the construction of said building upon said site; that he has not made an application to said Commission for his license or permit to engage in the manufacture, sale and distribution of ice in said city; that he does not intend to make such application and will, on or about May 15, 1930, commence the business of the manufacture, sale and distribution of ice within said city without complying with said act, in competi-

tion with the appellant, that the appellee has no right to engage in the business of the manufacture, sale and distribution of ice within said city without first having obtained a license or permit from said Commission so to do; that the manufacture, sale and distribution of ice by him within said city without first having obtained a license or permit from said Commission will injuriously affect the business, revenues and properties of the appellant which it has invested in the business of the manufacture and sale of ice in said city under said permit or license, and deprive it of its property without due process of law; that unless he is restrained and enjoined he will commence the business of the manufacture, sale and distribution of ice within said city without complying with said act, and in open violation thereof; that he, in the manufacture, sale and distribution of ice, will cover and include the territory now served and being served by the appellant in the manufacture and sale of ice under its license or permit from said Commission.

The answer of the appellee appears in the record at page [illegible]. In this answer he admits that the appellant is engaged in the manufacture of ice in Oklahoma City under a certain permit issued to it by the Corporation Commission of the State, but specifically denies that such license [illegible] property right, and denies that the value of the property of the appellant invested in the manufacture and sale of ice [illegible] $500,000.00 as alleged in the petition. He admits that he owns the building and

in said city referred to in the complaint of the appellant; that he obtained a building permit from said city to build and construct an ice plant thereon; that he has commenced the building and construction of said plant upon said site and is now in process of the construction of said building; that he admits that he has not made application to the Corporation Commission of the State of Oklahoma for a permit or license to engage in the business of the manufacture, sale and distribution of ice in said city, and that he does not intend to make such application and admits that he will commence the business of the manufacture, sale and distribution of ice in said city in competition with the appellant.

He alleges that he has the right to engage in the business of the manufacture, sale and distribution of ice in said city and that by so doing he will not deprive the appellant of its property without due process of law; that the business of the manufacture, sale and distribution of ice is not in fact a public business and that properties used in connection therewith are not public utilities. He also avers that the appellant, in the manufacture, sale and distribution of ice in said city is not engaged in a public business and that its properties used in connection therewith are not public utilities, and that the Corporation Commission of the State of Oklahoma is without power or authority, and is not charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in Oklahoma;

that it has no power to fix rates, rules, charges and regulations to be followed and observed by persons engaged in the manufacture, sale and distribution of ice.

He also avers that said Ice Act is repugnant to the Constitution of the United States, and particularly Section 10, Article 1 thereof, and the Fourteenth Amendment thereto. In connection with his allegation as to the constitutionality of said Act, he states:

> "Defendant states that he is the owner of the real estate hereinbefore described; that he has constructed a substantial building thereon to be used for the purpose of manufacturing ice therein, and has purchased all necessary machinery, and has expended the sum of about Forty Thousand Dollars therefor; that if he is prevented by the order of this court from using said property in the business of the manufacture, sale and distribution of ice, he will be deprived of his property without due process of law, in violation of the aforesaid provisions of the Constitution of the United States, and will suffer great and irreparable injury."

He also avers that the business of the manufacture, sale and distribution of ice is a private business and not clothed with a public interest; that such business is not carried on under the authority of a public grant or franchise and does not render a public service; that said business does not exercise the right, and has not the power, of eminent domain, nor does it require the use of the streets and highways in any manner not used by the public at large; that such business is not injurious to the public health, safety or morals, but is a useful and necessary occu-

pation; that ice is manufactured or sold in practically every city, town and community in the State of Oklahoma by sundry persons, firms and corporations, and that such business is not and has not been conducted in restraint of trade, and said business is not a monopoly.

The appellee in his answer, as before stated, admits that the appellant was engaged in the manufacture of ice, but denies that it was engaged in the sale and distribution thereof. During the trial of the case in the trial court, the following stipulation was made:

> "It was then stipulated that the law as it is now upon the statute books had been generaly acquiesced in by the industry from the date of its passage to the present time, and that the parties complainant were engaged in the manufacture and sale of ice in Oklahoma City under a permit issued by the Corporation Commission under the provisions of the act in controversy" (R. 44).

Under this stipulation and the admissions of the appellee in his answer, the appellant was engaged in the manufacture and sale of ice in Oklahoma City under a permit duly issued to it by the Corporation Commission under the terms and provisions of said Ice Act.

The case was tried in the trial court on May 22, 1930, and was submitted and taken under advisement on that date (R. 19). At the time of the commencement of this action, the Southwest Utility Ice Company commenced a similar action against the appellee, and the two cases were

tried and submitted together (R. 9-10). The duplicate permit or license issued by the Corporation Commission to the Southwest Utility Ice Company was introduced in evidence by the appellee and such permit or license, omitting the caption and signature of the Corporation Commission, is:

"Know All Men by These Presents: That Southwest Utility Ice Company of Oklahoma City, a corporation, having filed application for license to manufacture, distribute and sell ice in the State of Oklahoma, at Okahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1923.

"That said Southwest Utility Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Oklahoma, at Oklahoma City, from July 1, 1929, to June 30, 1930, inclusive.

"In Witness Whereof, The Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary, and its seal affixed thereto, this the 20th day of July, 1929."

The appellant had a similar permit or license, and, according to its terms, it expired on June 30, 1930. The trial court entered its decree on June 24, 1930, and held that said Ice Act was unconstitutional and void, and that the complaint of the complainant was without equity and should be dismissed with prejudice (R. 19). A memorandum opinion was filed by the trial court upon the date of the entry of the decree.

The trial court held that the burden was upon the appellee, and a narrative statement of his evidence appears

in the record at pages 20 to 25. A narrative statement of the evidence of the appellant appears in the record at pages 25 to 44.

The evidence of the appellee consists of the testimony of himself and six others, and deals primarily with the condition of the ice industry in Oklahoma City. His testimony, however, constitutes the major portion of his evidence. The applicable portion of his evidence is:

That he lives in Oklahoma City, and has been a resident of the State for forty-one years; that he has been engaged in the ice business in Oklahoma and Texas since 1903; that at the time said Ice Act was passed he had a plant in Oklahoma City; that there were eight plants there at that time; that he knew of no agreement among the companies to manufacture and sell ice at a certain price prior to the passage of said act; that these eight plants were owned by six companies; that there were eleven plants in Oklahoma City at the time this case was tried, which were owned by three companies; that the price of ice prior to the passage of the Ice Act was hard to fix; that there were different classes of trade, and different prices; that prior to the passage of the Ice Act he (appellee) sold ice for 60 cents cash delivered, 57½ cents per hundred where they took coupons; 40 cents per hundred at the dock; sold to dairymen for 30 cents; that companies in Oklahoma City were generally along that line in price, but there was no

agreement; that cash trade delivery in Oklahoma City now is practically the same price as before; that coupon books are 55 cents per hundred in place of 57½ cents; that dock prices are the same, except outlying towns that are selling now for 50 cents; country town and dairy deliveries are now 35 cents.

That the plant which he (appellee) had built had a daily capacity of between 25 and 30 tons; that he had spent approximately $40,000.00 in building it; that he was ready to commence the manufacture, sale and distribution of ice of May 1, 1930; that he used two men in the operation of his plant—one day and one night man; that it did not require any unusual skill to operate a modern, raw water, electrically driven plant; that the ice business is merely manufacturing and selling a product; that there is no difference between the ice business and that of a butcher, grocer or baker; that there is no material difference between a commercial ice plant and a home refrigerating plant; the principle is the same and both are simple in their construction and operation; that there were a good many individual ice plants in Oklahoma City and other cities of the State; that hotels, restaurants, meat markets and hospitals often have their own plants, as do lots of dairymen.

That between 30 and 40 per cent of ice is sold at the docks in 20, 25, 50 and 100-pound chunks, and the rest of it is hauled in wagons and trucks; that ice can now be

manufactured cheaper than it could be in 1925; that electric power has been reduced some; that the equipment is simpler, and more ice can be handled with an electric hoist than before that improvement.

That ice would stand shipping in a refrigerator car 100 or 125 miles, if it is loaded just ahead of the train that moves it; that you could ship ice a distance of 50 or 75 miles in a car, put it in cold storage, and compete with the man on the ground; this was not practical, but it could be done; that the distance that ice could be carried in a truck and delivered depended on the roads and the season of the year; that ice, with 10 per cent overweight, by carefully covering it, could be delivered to customers over a period or three or four hours before melting, so a customer would lose no weight; that prior to 1925 some ice men sent out scored ice; some did not; that he did not recall any place where there was any material difference in the price of ice in competitive points prior to 1925; that the freight rates on ice are from 8 cents to 10 cents per hundred pounds on distances of 50 or 60 miles; that there is considerable trucking of ice from one place to another.

The appellee testified that in his testimony he had reference to conditions in Oklahoma City; that he could not say whether there were more than six competitive points in the entire State as regards the manufacture and sale of ice in 1925; that he did not believe there were as many as

one-third of the ice plants in Oklahoma in 1925 owned by the electric power companies; that in his judgment $1,500.00 a ton capacity would erect a new raw water ice plant; that there was not much difference in the price of equipment now and the price prevailing in 1925 (R. 20-22).

Some of the other witnesses who testified for the appellee corroborated him in part, and their testimony as a whole is in line with his (R. 22-24).

The evidence of the appellant consists of the testimony of six witnesses, together with certain orders of the Corporation Commission and excerpts from the reports of that Commission to the Governor. Its evidence deals, in a general way, with the condition of the ice industry throughout the state, both before and after the passage of the Ice Act, which we briefly summarize as follows:

Prior to the passage of the Ice Act the Corporation Commission undertook to and did deal, in a general way, with the ice business under the original Trust Act as applied to plants in given communities. On July 27, 1911, the Commission made an order effective August 6, 1911, dealing with the ice business as applied to Oklahoma City (R. 27-28). On July 15, 1921, said Commission made a general order dealing with the ice industry in the state as a whole (R. 28-31). The Corporation Commission, in its annual message to the Governor, in 1915 and in 1916, under the title, "Scope of Legislation," said:

"Pertaining to those utilities which serve the public generally should be broadened. Two conspicuous examples are ice plants and cotton compresses. Chapter 93, Session Laws, 1915, extend the jurisdiction of the Corporation Commission over water, heat, light and power plants, but does not include ice plants. Numerous complaints are received by the Commission each year as to exorbitant prices of ice companies and exorbitant prices charged. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies" (R. 37-38).

In October, 1918, the Commission, in its annual report to the Governor, dealing with the ice business, said:

"The ice business of manufacturing and distributing ice is as much a matter of public concern as is the business of rendering water, electricity or gas service, and should be subject to the same regulation. Complaints are constantly being made to the Commission in reference to the prices of ice, practices of ice companies or service rendered by such companies, and the Commission has frequently been called upon to exercise jurisdiction under the so-called Anti-Trust law. Specific legislation should be enacted in reference to these companies, and the power of regulation should be made definite and certain" (R. 37).

Campbell Russell was a member of the Corporation Commission for the years 1917 to 1922, inclusive, and in his testimony, with reference to the activities of the Commission for these years, he said that during these years the Commission exercised general jurisdiction over the ice business in the state with reference to rates, practices and service. He then refers to the 1918 report of the Commission to the Governor and with reference thereto says:

> "The occasion for this recommendation was that the Commission felt their power should be made more definite; that the things that brought to the Commission's notice the need of this sort of legislation were complaints of neglect of service, short weight, poor quality of ice and prices that were considered unfair; that from time to time they had ice companies cited before them relative to prices" (R. 37).

He also identified a later report which was made by the Commission to the Governor which embodied substantially the same recommendations contained in the previous reports, except that it contained the statement that complaints had been received from more than one hundred cities and towns of the state (R. 38).

Many years prior to the passage of the Ice Act the Oklahoma Ice Manufacturers Association was organized. W. P. Hill, a witness for the appellant, was the secretary of that association from the fall of 1919 until after the passage of the Ice Act in 1925, and as such secretary was familiar with the ice situation throughout the state, both before and after the passage of the act. This association was organized for the purpose, among others, of correcting the evils and abuses prevalent in the ice industry and to aid and assist the Corporation Commission in its efforts to remedy and correct such evils and abuses. Numerous complaints were filed before the Corporation Commission prior to the passage of the Ice Act and the secretary of the association, under the direction of the Corporation Commis-

sion, investigated these complaints. The complaints as a rule were as to discrimination in service, insufficient weights and exorbitant prices. For some time prior to the passage of the Ice Act, during the ice season, Tuesday of each week was reserved by the Corporation Commission to hear complaints relative to the ice business and the secretary of the association used the remainder of the week in an effort to work out and adjust the various complaints as to individual ice plants throughout the state (R. 25-26).

During the 1924 ice season, complaints before the Corporation Commission had increased quite materially over previous years. During this year the ice peddler system came into existence in Oklahoma City and other points of the state, and many complaints were made against this system. The peddler was an independent dealer, owned his own equipment—might be a horse and wagon or truck; he would start work during the busy season, distribute where he pleased, and then the hot weather was over he would quit and leave the community without ice unless the established dealer there furnished it at a loss (R. 31-32). The peddler took the cream of the business and quit with the cooler weather. Many of the peddlers sold coupon books redeemable by them, and in many instances when the ice season was over they would leave their route without redeeming the unused coupons, and the customer was without relief (R. 32-33). Prior to the passage of the Ice Act, ice wagons as a rule were not equipped with scales, and a very

small portion of the ice sold was scored. By scoring is meant that a block of ice to be delivered as a 300 pound block was frozen at a weight from 12 to 16 pounds greater. It was taken from the storage room, put through a machine with saws which were set so that it divides the ice in correct and differing weights in proportion to the size of the block, that is, in hundreds, fifties, etc. (R. 32). In towns of four or five hundred population there were often several dealers who kept ice, such as the butcher, the merchant, etc. This business was unprofitable, the service was poor, and there were no means of effective regulation and control of this class of business (R. 33).

At the time the Ice Act went into effect there were eleven or twelve communities in the state having more than one ice plant. Among these there were five or six places that had no semblance of competition, and the plants at these places would sell their ice to a common delivery system, which was composed of men who owned and controlled the ice properties. The plant would operate under its corporate name but would be owned in fact by the delivery system. In six or seven points where there might be said to be a semblance of competition, in no place was there any substantial difference in price (R. 31-32). Taking two million inhabitants as a basis of population for 1920, some 235,000 people were residents of points presumably competitive but for the remainder of more than 1,700,000 competition was not possible (R. 32). At the time the Ice Act was

passed there were approximately 160 ice plants in operation in the state, with a capacity of 700,000 tons; this number has not increased more than twenty-five since the act was passed, but the tonnage has materially increased and many plants have been converted from steam or distilled water into what is known as electrically driven raw water plants.

As determined by the hearings before the Corporation Commission, the average cost for erecting an ice plant was $2,500.00 per ton. This varies some with the character of the property on which the plant was constructed and the nature of equipment going into it (R. 31). Prior to 1925, out of 705,000 tons of ice manufactured and marketed in Oklahoma, a little more than one-third of the ice plants were owned by electric public service companies (R. 34), and these companies operated their ice plants as a side line to their public utility business (R. 36).

Prior to the passage of the Ice Act, ice was sometimes sold for 25 cents a hundred to certain classes of trade, but it was what was known as waste ice, white or broken-up ice, that could not be used for domestic purposes, and was often dumped in the cooling tower (R. 34).

The secretary of the Ice Association, dealing with the ice situation since the passage of the act, among other things, said:

The dairy business has made rapid strides in the state on account of the rule of the Corporation Commission requiring the ice companies who have permits to serve the small communities; that in all the communities lying between points supplied by the factory by truck, ice is distributed to farmers upon the ground and produce, such as eggs, butter and milk, are now being produced through the use of ice so they reach the market fresh and salable; that this service has increased the production of this kind of farm product to a marked degree; that large concentrated buying points were established; from these points carloads of butter, chickens, eggs and milk under refrigeration are shippped out daily, and that the market outlet for products of this kind has greatly increased (R. 33). That ice wagons are now required to furnish fresh ice every two and a half hours; that this is accomplished by what is known as relay trucks that leave the plant for routes at designated points; that the relay truck meets the wagon, takes the shrunken ice, credits the driver with it and puts fresh blocks in the wagon; that where larger blocks are used three hours may be sufficient; that blocks come out of the plant weighing 312 to 320 ponuds in order to allow for shrinkage; that these conditions and improvements have been brought about due largely to the requirement of the Commission for full weight; that another requirement of the Commission is that regular deliveries must be made in the forenoon; that prior to the passage of the Ice Act deliveries were most irregular,

and at the present time the public demands and is receiving a better service in ice than before, and that the improved conditions are due primarily to the regulation of the Commission (R. 34).

He also testified that in the United States about twenty per cent of the entire manufactured ice is used in moving food and dairy products to the market; that the exact proportion used in Oklahoma is hard at the present to determine, but that the business has increased since 1925 in spite of inroads made by private refrigeration; that there has been a general average of ice manufactured of more than six per cent per year since 1925, notwithstanding private refrigeration; that the cost of installing a private ice machine will range from two hundred dollars up to as much as you want to pay for it; that private refrigeration was just coming into use in 1925; that whatever growth it has had has come since that time; that since the passage of the Ice Act the trend of prices on ice sold in the state has been downward; that there has been an increase in the use of ice for household purposes; that there has been a decrease in the use of ice for butcher shops, drug stores, etc; that there has been a large increase of ice in rural communities, and the price of domestic ice has been materially reduced (R. 33-34).

He also testified that the ice season in Oklahoma begins about April 15th, extends to about September 15th, and

that the peak of the business is reached about July 15th; that ice is a seasonable product; must be used soon after it is manufactured, and cannot be shipped any considerable distance; that a car of ice will average 18 tons; that in small communities the peak demand will probably be one and one-half to two tons per day; that a car of ice should last about a week but for the shrinkage. The natural result is that toward the latter part of the week the loss in shrinkage is great, the block becomes fragile, easily broken, and cannot be used with satisfaction (R. 35).

Mr. L. J. Lahman, a witness for the appellant, after stating he was familiar with the price of ice in Oklahoma beginning with the year 1925 until the year 1930, said:

That he compiled average figures on the state as a whole which show a decrease in the price to the consumer; that complainant's Exhibit "5" was taken from the prices of retail ice as shown by the records of the Corporation Commission and that the amount saved to the consumer, as shown by these prices, for the various years was as follows:

1926	1927	1928	1929
$55,279.04	$89,715.24	$287,260.80	$328,223.80

and that the estimated saving for the year 1930, based on 715,000 tons production, would be $414,700.00 (R. 38). He also testified that the operating season of the ice business in Oklahoma averaged 116 days in 365, or thirty-two per cent operating season out of the year; that after the passage of

the act in 1925, and in compliance therewith, schedules were filed for towns without manufacturing plants, rural communities and rural routes affecting 378 places; that in 1930 there had been filed with the Corporation Commission 769 schedules covering the same class of locations, an increase in the rural business of the state of more than one hundred per cent coverage; that the result of the rural service had been to increase the production of milk, butter, eggs and fresh vegetables for the farmer; that the dairy business had been developed extensively (R. 39).

He also testified that a large per cent of the ice manufactured and sold goes to the preservation of food, and in this connection stated that approximately fifteen or twenty per cent of the ice manufactured in the State of Oklahoma is consumed in the preservation of food products in transit either from the state out or through the state. He also testified that in the summer time more than fifty per cent of the delivered retail ice goes to the home (R. 40).

L. C. Smith who testified for the appellant is secretary of the National Association of Ice Industries, and had acted in that capacity for thirteen years past; that eighty-four per cent of the ice produced in America was manufactured by members of his association; that the ice business for the last eleven years has increased on an average of 5.35 per cent per year; that in 1914 there were in the neighborhood of 2700 ice plants in the United States; that in 1930 there

were in excess of 6200; that the growth had been under two classifications—one in congested cities and the other in development of perishable products; that the consumption of ice by retail domestic consumers during these years had largely increased; that statistics showed that twenty-nine per cent of the ice produced and used went to the domestic consumer in 1919; that in 1929 forty-seven per cent was consumed by the domestic consumer; that in 1919 the per capita consumption of ice was 712 pounds, and in 1929 it was 1157 pounds per capita (R. 42).

A. J. Authenrieth, a refrigerating engineer of many years experience, testified for the appellant, and among other things, said: That he had made a very extensive study of the use of ice in the transportation of food products throughout the United States; that attempts had been made to find a substitute for ice; that the attempts were unsuccessful; that merchandising of ice differed from the merchandising of other food products in that it was a perishable product, and it must evaporate in order to work or obtain its refrigerating effect; that it must be put to use soon after it is manufactured in order to get the effects of it; that it is a very perishable product and cannot be kept in storage for very long except at very low temperature; that it should be marketed as it comes from the freezing vats; that delivery by wagon to the domestic trade is limited to a radius of from twelve to fifteen miles; that ice could not be shipped without ruinous loss over fifty or seventy-five

miles; that the manufacture of ice is a rather highly specialized business; that in order to produce ice in any plant there are three distinct systems, the ammonia system, the air system and the water system in what is known as the raw water plant; that the production of merchantable ice is a highly specialized thing; that water and air have all to do with the quality of ice you are going to produce; that the water must be specially treated if it comes to your home free from bacteria; that if you get water from city mains, it may be so highly mineralized that you cannot make a clear block of ice out of it that it requires then special air treatment.

He also testified that about twenty per cent of the entire ice produced is now used in the preservation of food and food products in transportation; that ice is the conservator of the nation's food supply; that without it we could not exist; that in 1922 there were loaded in Oklahoma 1676 cars of food products under refrigeration; that in 1925, 2940 cars were so used, and in 1929, 3347 cars were so used (R. 42-43).

Dr. DeBarr, who was head of the Chemistry Department of the University of Oklahoma from 1892 to 1923, testified, among other things, that he had made a study of the use of ice as applied to perishable food products and also as to health conditions of the State; that it conserves the food products by saving them and keeping them in good,

usable condition for a long time; that it conserves the health in furnishing suitable foods and in the cure of disease; that ice bears a very important relation to the dairy business and is necessary in keeping milk, cream, butter and cheese at temperatures necessary for their preservation, and that the growth and production of perishable food products in recent years in the State of Oklahoma has been largely due to the use of ice (R. 41).

In connection with the evidence of the appellant, it was stipulated, as before stated, that the ice industry as a whole, had acquiesced in the Ice Act since its passage (R. 44).

The appellant prosecuted an appeal from the judgment and decree of the trial court to the United States Circuit Court of Appeals for the Tenth Circuit, and that court, on August 27, 1931, entered a final decree affirming the judgment and decree of the trial court (R. 57). The opinion of that court was filed on August 20, 1931.

The two cases—New State Ice Company vs. Liebmann (this case), and The Southwest Utility Ice Company vs. Liebmann—were argued and submitted together in the Circuit Court of Appeals and disposed of in one opinion. Separate appeals, however, were taken to that court and separate appeals have been taken here. The case of The Southwest Utility Ice Company vs. Liebmann is Number 316 here, and a stipulation has been filed in that case to

the effect that, with the approval of this Court, it may abide the judgment of this Court in this case.

The permit or license of the appellant bears date July 20, 1929, and runs from July 1, 1929, to June 30, 1930, inclusive (R. 25). The appellee contended, in the Circuit Court of Appeals, that since this license or permit expired on June 30, 1930, that the appeal should be dismissed because the question involved was moot. At the time the case was tried and disposed of in the trial court, the permit or license was in full force and effect, and the time had not arrived for the appellant to secure a new license. The Circuit Court of Appeals, in discussing this question, said:

> "The last license in the record expired June 30, 1930. Renewals of such licenses are neither pleaded nor proven. This alone would justify an affirmance of the decree below, but, in view of the statement of plaintiff's counsel at the oral argument that such licenses were in fact renewed, we proceed to a consideration of the merits" (R. 48).

We feel that the Circuit Court overlooked the fact that renewals could neither have been pleaded nor proven at the trial of the case because the present licenses had not yet expired, and there was no occasion for getting new licenses, pleading or proving the same. Be that as it may, the Circuit Court of Appeals disposed of the cases upon their merits and relied upon the statement of counsel that renewal licenses had been obtained, and we make the same statement to this Court and respectfully submit that the cases should be disposed of upon their merits.

In this connection we set out in the Appendix the annual license issued to the appellant by the Corporation Commission on June 30, 1930, running from July 1, 1930, to June 30, 1931. We also set out in the Appendix the annual license issued to appellant by the Corporation Commission on July 10, 1931, running from July 1, 1931, to June 30, 1932. These licenses certainly show that the appellant has now, and has had since the institution of this action in the court below, a license duly issued by the Corporation Commission.

SPECIFICATION OF ERRORS

The appellant, in its assignment of errors, assigned two errors which it will urge here, and they are:

> "(1) That said Circuit Court of Appeals erred in holding that the Act of the Legislature of the State of Oklahoma, approved April 7, 1925, being Chapter 147, Session Laws of Oklahoma, 1925, was invalid, on the ground of its being repugnant to the Constitution of the United States.
>
> "(2) That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma dismissing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States" (R. 59-60).

SUMMARY OF THE ARGUMENT.

The appellant, under paragraph 9 of Rule 13, filed a statement of the points on which it intended to rely, which statement is:

"Point I.

"That the Act of the Legislature of the State of Oklahoma, approved April 7, 1925 (being Chapter 147, Session Laws of Oklahoma, 1925), is valid, and the United States Circuit Court of Appeals, Tenth Circuit, erred in holding said Act invalid on the ground that it was repugnant to the Constitution of the United States.

"Point II.

"That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, dismissing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States.

"Point III.

"That said legislative act declares the manufacture, sale and distribution of ice to be a public business, and, under the facts and circumstances as disclosed by the evidence, the manufacture, sale and distribution of ice is a public business, subject to regulation and control by the Corporation Commission of the State of Oklahoma under the terms and provisions of said Act, and said Circuit Court of Appeals erred in holding said Act invalid on the ground of its being repugnant to the Constitution of the United States, and in affirming the judgment and decree of the District Court" (R. 63-64).

and it adopts the same as its summary of the argument.

ARGUMENT

First Proposition

The Act of the Legislature of the State of Oklahoma, approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma, 1925), is valid, and the United States Circuit Court of Appeals, Tenth Circuit, erred in holding said Act invalid on the ground of its being repugnant to the Constitution of the United States.

(Points I, II and III of the Summary.)

The three above named points of the summary may, as we think, be properly argued and presented under the above stated proposition.

If said act is valid, then the license or permit issued to the appellant thereunder by the Corporation Commission is a property right in the nature of a franchise granted in consideration of the performance of a public service, and is within the protection of the Fourteenth Amendment, and, as between the appellant and the appellee, said franchise is exclusive.

Frost v. *Corporation Commission of State of Oklahoma,* 278 U. S. 515, 73 L. ed. 483.

Peoples Transit Co. v. *Henshaw* (8th Cir.), 20 Fed. (2d) 87.

Said act is presumptively valid, and this Court, in considering the same, will assume that if a state of facts could exist that would justify such legislation it actually did exist when the act was passed. If there is reasonable doubt as to

the validity of the act it will be sustained, and the burden is upon the appellee to show a state of facts clearly establishing the invalidity thereof. The wisdom or expediency of the legislation is for the Legislature, but the legislative declaration is not conclusive, and this Court has the right to determine the question of the power of the Legislature to pass the act.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

McLean v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315.

Chicago, B. & Q. R. Co. v. *McGuire*, 219 U. S. 549, 55 L. ed. 328.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389. 58 L. ed. 1011.

Corporation Commission v. *Lowe*, 281 U. S. 431, 74 L. ed. 945.

South Utah Mines & Smelters v. *Beaver County*, 262 U. S. 325, 67 L. ed. 1004.

Toombs v. *Citizens Bank*, 281 U. S. 643, 74 L. ed. 1088.

Section 15, Article 9 of the Constitution of the State of Oklahoma creates the Corporation Commission. Section 18 of this article confers the power and authority upon said Commission as to the regulation and control of all transportation and transmission companies doing business within the State. Section 19 of this article deals with the power and authority of the Commission, and, among other things, provides:

"The Commission may be vested with such addi-

tional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith."

The Legislature in Section 13 of the original Trust Act of June 10, 1908 (Session Laws of Oklahoma, 1907-08, page 750), hereinbefore referred to, conferred additional powers upon the Corporation Commission. After the passage of this act, said Commission undertook to, and did in a limited way, regulate and control the price, service and practice of the ice industry as applied to individual plants in given cities and towns of the State. An application was made to the Commission by a citizen of Holdenville, Oklahoma, to regulate the price of ice sold by the Oklahoma Light & Power Company in that city. That company operated a light and power plant in Holdenville, and in addition thereto, manufactured and sold ice. It was claimed that the price of ice was excessive, and the jurisdiction of the Commission was invoked to inquire into, determine and fix a price for which ice might be sold in that city. Said light and power company brought an original proceeding in the Supreme Court for a writ of prohibition challenging the right and power of the Commission to exercise the jurisdiction invoked. The Supreme Court denied the writ and upheld the power and authority of the Commission to in-

quire into, determine and fix the price for which ice might be sold in Holdenville. *Oklahoma Light & Power Co.* v. *Corporation Commission*, 96 Okla. 19, 220 Pac. 54.

It was contended in this case that the power to regulate by the Commission under Section 13 of the original Trust Act (11032, Chapter 90, Compiled Oklahoma Statutes, 1921), applied only to business in restraint of trade as defined in Section 1 of said original Trust Act (11017, Chapter 90, Compiled Oklahoma Statutes, 1921), and that the rule theretofore announced by the Supreme Court of the State in *Shawnee Gas & Electric Co.* v. *Corporation Commission*, 35 Okla. 455, 130 Pac. 127, and *Oklahoma Gin Co.* v. *State*, 63 Okla. 10, 158 Pac. 629, supported that contention.

The Supreme Court, in *Shawnee Gas & Electric Co.* v. *Corporation Commission, supra*, quoted approvingly from an unpublished opinion of Justice Hayes of that Court in an unnamed case. This unpublished opinion was likewise quoted approvingly by the Supreme Court in the case of *Oklahoma Gin Co.* v. *State, supra.* Justice Hayes wrote the opinion for the Court in the case of *Shawnee Gas & Electric Co.* v. *State ex rel Shawnee Waterworks*, 31 Okla. 505, 122 Pac. 222, and announced this rule:

> "This Court is without jurisdiction to review on appeal an order of the Corporation Commission prescribing a schedule of rates to be charged by a gas company for gas it distributes to its patrons."

In the concluding part of this opinion it is said:

> "It follows that from these views the opinion and judgment heretofore rendered herein should be set aside, and this appeal dismissed."

Our investigation leads us to believe that this is the case referred to by the Supreme Court in the above cited cases and that the unpublished opinion quoted from was the first opinion written and filed in that case, and that later that opinion was withdrawn and the opinion reported filed, and that as a matter of fact the quoted unpublished opinion never was published.

The Supreme Court, in *Oklahoma Light & Power Co.* v. *Corporation Commission, supra,* refers to these two previous decisions, distinguishes them, and holds in effect that the rule therein announced is too narrow. We quote the following:

> "While we consider these opinions essentially correct in principle, yet it is clear from a careful consideration of the same that a much narrower construction is placed upon Section 13 of the Act, *supra* (Section 11032, Comp. St. 1921). than the language used in said section will justify."

The Court also held in this case:

> "Upon a careful consideration of the act in question, we have no difficulty in concluding that the purpose of the act is two-fold: First, to define a trust on monopoly and provide for prosecution. Second, the regulation of any business when conducted under any of the following circumstances: Where the business, by reason of its nature, extent or existence of a virtual monopoly therein, is such as to clothe it with a public

interest of such nature that is of legal cognizance, and where the consideration taken by the business or commodities bought or sold therein are offered or taken by purchase or sale in such manner as to materially affect the public as to supply, demand, price or rate thereof, or if the business is conducted so as to come within the statutory characteristics and thereby affects the public interest to such an extent as to be of public consequence, then the statute authorizes the Commission to regulate.

* * * * * * * * *

"In the case of *Oklahoma Gin Co.* v. *State, supra,* it will be noticed the court substitutes the word 'and' in the place of the disjunctive 'or' used in the statute, and thereby destroyed the plain intention of the Legislature, as evidenced by the language used.

* * * * * * * * *

"We are clearly of the opinion that the first section of the act defined an unlawful agreement, contract, or combination in restraint of trade or commerce and declared and made the same illegal, and in subsequent sections of the act provided for the prosecution, dissolution and punishment of such combination. It will here be observed if such a trust is dissolved and restrained from doing business, the regulation provided for in Section 13 would have no application to such a business. Section 13 of said act plainly provides for the regulation of any business which by reason of its nature and extent, or in the event of a virtual monopoly therein, is such that the public must use the same or its services, or such business sells commodities in such a manner as to make it of public consequence so as to affect the community at large as to supply, demand or price, or rate thereof—that then such business is subject to regulation. The right to regulate under Section 11032 of the statute depends upon the established facts in each particular case.

* * * * * * * * *

"It is clear from Section 13 of the act that it was the legislative intent to vest the Corporation Commission with power to regulate a business by reason of its nature and extent that makes it of public consequence or affects the public interest in such a way as to demand regulation, or where such business is of such a nature as to result in a virtual monopoly therein to the persons engaged in such business to such an extent as to place it within the power of such persons to control the supply and demand for the practices, prices, rates and charges of such business.

"It is our conclusion that the business subjected to regulation under the first part of Section 13 of the act, *supra*, falls within that class of business described as the third class subject to public regulation by Chief Justice Taft in the case of *Wolff Packing Co.* v. *The Court of Industrial Relations of Kansas*, 262 U. S. 522.

* * * * * * * * *

"The manufacture, sale and distribution of ice in many respects closely resemble the sale and distribution of gas as fuel, or electric current, and in many communities the same company that manufactures, sells and distributes electric current is the only concern that manufactures, sells and distributes ice, and by reason of the nature and extent of the ice business it is impracticable in that community to interest any other concern in such business. In this situation, the distributor of such a necessity as ice should not be permitted by reason of the impracticability of any one else engaging in the same business to charge unreasonable prices, and if such an abuse is presisted in, the regulatory power of the State should be invoked to protect the public."

The Supreme Court, in this case, clearly holds that the Corporation Commission under the original act, prior to the passage of the Ice Act, had the authority to fix and

regulate the price of ice as to an individual plant in a given locality under Section 13 of the original Trust Act, without regard to Section 1 thereof, and that the rule theretofore announced by the Supreme Court in the cases of *Shawnee Gas & Electric Co.* v. *Corporation Commission*, *supra*, and *Oklahoma Gin Co.* v. *State*, *supra*, was limited and modified. See also, *Consumers Light & Power Co.* v. *Phipps*, 120 Okla. 223, 251 Pac. 63.

The Supreme Court of Oklahoma also held that the Corporation Commission might fix and regulate the price of ginning cotton under the original Trust Act. *Harris-Irby Cotton Co.* v. *State*, 31 Okla. 603, 122 Pac. 163. It was held, however, in this case that such an order was not an appealable one. The case of *Oklahoma Gin Co.* v. *State*, *supra*, dealt with the power and authority of the Corporation Commission to fix the price for ginning cotton under the original Trust Act, and reaffirmed its authority so to do, but in so holding tied together Sections 1 and 13 of said original Trust Act.

About this time the Corporation Commission undertook to fix and regulate the price of laundry in Oklahoma City under Section 13 of the original Trust Act (Section 8235, Chapter 79, Revised Laws of 1910), and made an order having that effect. Its right to make such an order was challenged, and it was contended, among other things, that said order was void because there was no right of judicial

review except by way of defense to proceedings for contempt for violating the same. This Court held the order void on this account. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 64 L. ed. 596. The case of *Oklahoma Gin Co.* v. *State, supra*, came to this Court and was reversed for the same reason. *Oklahoma City Co.* v. *State of Oklahoma*, 252 U. S. 339, 64 L. ed. 600.

On March 22, 1915, the Oklahoma Legislature passed an act (Chapter 176, Session Laws of Oklahoma, 1915), declaring cotton gins a public utility. Section 1 of this act is:

> "That cotton gins are hereby declared to be public utilities, and the operation of same for the purpose of ginning seed cotton is declared to be a public business."

This act was assumed valid by the State Supreme Court in the case of *Sims* v. *State*, 80 Okla. 254, 196 Pac. 132. See also *Planters Cotton & Ginning Co.* v. *West Bros.*, 82 Okla. 145, 198 Pac. 855. In *Frost* v. *Corporation Commission*, 278 U. S. 515, 73 L. ed. 483, the parties thereto conceded the act valid and this Court assumed it valid for the purpose of the decision in that case. In April, 1930, the Circuit Court of Appeals for the Tenth Circuit held the act valid. *Chickasha Cotton Oil Co.* v. *Cotton County Gin Co.*, 40 Fed. (2d) 846.

The Cotton Act (Sections 3712-3715, Compiled Oklahoma Statutes, 1921), declares cotton gins to be public utilities, forbids operation without license to be

granted by the State Corporation Commission, and provides for regulation by the Commission. The Tenth Circuit, as before stated, in the above cited case, held this act valid, and we think the rule announced in that case supports our contention as to the validity of the Ice Act.

In 1916 the Corporation Commission of the State, in *Garner* v. *Tulsa Ice Co.*, P. U. R. 1917C 613, treated and regarded the ice business as affected with a public interest and ordered an ice company to furnish a drug store ice at the same rate which it was furnishing a meat market. This holding was under the original Trust Act. The Supreme Court of the State in 1923, in *Oklahoma Light & Power Co.* v. *Corporation Commission, supra,* treated the ice business as affected with a public interest and subject to regulation and control as to practices and prices under the original Trust Act. There were many abuses and evils in the industry prior to the passage of the Ice Act, and, as before stated, the Corporation Commission endeavored to remedy these evils and abuses. Its power in that regard was limited. The Commission, whose duty it was to protect the public against these evils and abuses, through a period of years called to the attention of the Governor the defects in the anti-trust act as regards its power to regulate and control the prices and practices of ice companies, and urged additional legislation, and as a result of many years discussion of the evils existing as to the ice industry, the Ice Act was passed in 1925. This act was acquiesced in and

treated as valid by the ice industry for a period of five years after its enactment. There was but little or no competition in the ice industry prior to the enactment of the Ice Act. Public service corporations owned one-third of the plants and operated them in connection with their public utility business. The evidence discloses that conditions have noticeably improved in the ice industry since the passage of the act. These improved conditions are not, of course, all due to the passage of the act, because there have been improved conditions in the industry in other States, but it is fair to assume, as we believe, from the evidence in this case, that the major portion of the improved conditions are traceable to the act. Ice is an article of common household necessity, the supply of which must ordinarily be purchased every day. The use of it has and will play a prominent part in the growth and development of the rural communities of the State, the health and comfort of its citizens, and promote the general welfare of the State, and properties used and committed to the manufacture, sale and distribution of ice may reasonably, as we believe, be treated and regarded as utilities subject to regulation and control, and that the State, in the exercise of its police power, for the common good, had the right, in our judgment, to enact the Ice Act.

This Court will take notice of the climatic conditions of Oklahoma, and we think a state of facts did exist at the time of the passage of the Ice Act justifying its enactment.

The evidence of the appellee certainly does not of itself show a state of facts justifying this Court in declaring the act invalid, and, considering the presumptions prevailing as to the validity of a State statute, we believe the act is constitutional under the rule announced by this Court in the following cases:

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

Budd v. *State of New York*, 143 U. S. 517, 36 L. ed. 247.

Brass v. *State of North Dakota* (Stoeser), 153 U. S. 391, 38 L. ed. 757.

Spring Valley Waterworks v. *Schottler*, 110 U. S. 347, 28 L. ed. 173.

Noble State Bank v. *Haskell*, 219 U. S. 104, 55 L. ed. 112.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 67 L. ed. 1103.

Terminal Taxicab Co. v. *Kutz*, 241 U. S. 252, 60 L. ed. 984.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324.

Liberty Warehouse Co. v. *Burley Tobacco Growers Coöperative Marketing Assn.*, 276 U. S. 71, 72 L. ed. 473.

Texas & Pacific Ry. Co. v. *Gulf, Colorado & Santa Fé Ry. Co.*, 270 U. S. 266, 70 L. ed. 578.

The act not only gives the right of regulation and control as to prices and practices, but gives the added right of

determining whether or not the public necessity and convenience require an ice plant or additional ice plant facilities in a given community. This right, as we view it, is essential in order to give proper and effective regulation of prices for the common good, because if the Commission is without authority to determine when and under what circumstances an ice plant shall be built and constructed in a given community without regard to the necessity therefor from a public standpoint, then in the end the public will suffer. The act, we believe, may be distinguished from and is not controlled by the rule announced by this Court in:

Tyson & Bro. v. *Banton*, 273 U. S. 418, 71 L. ed. 718.

Williams v. *Standard Oil Co.*, 278 U. S. 235, 73 L. ed. 287.

Ribnik v. *McBride*, 277 U. S. 350, 72 L. ed. 916.

Fairmont Creamery Co. v. *State of Minnesota*, 274 U. S. 1, 74 L. ed. 893.

Oklahoma is the only State of the Union, so far as our information goes, which has declared the manufacture, sale and distribution of ice a public business. This is no reason, of course, why the act should be stricken down. Arkansas passed a similar act, and the Supreme Court of that State sustained the act as to prices, rates, discrimination, and other matters incident thereto, but held invalid that portion of the act giving the Railroad Commission the power to deny one the right to engage in the business in a given community, irrespective of the necessity.

Cap F. Bourland Ice Co. v. *Franklin Utilities Co.*, 180 Ark. 770, 22 S. W. (2d) 993, 68 A. L. R. 1018.

There are some State Court decisions which we believe are helpful in support of our contention, some of which are:

Holton et al. v. *City of Camailla* (Ga.), 68 S. E. 472.

Laughlin v. *City of Portland* (Me.), 90 Atl. 318.

City of Tombstone v. *Macia* (Ariz.), 245 Pac. 677.

City of Denton v. *Denton Home Ice Co.* (Tex.), 18 S. W. (2d) 606.

City of Denton v. *Denton Home Ice Co.* (Tex.), (on rehearing), 27 S. W. (2d) 119.

The Circuit Court of Appeals, in its opinion, refers to the Ice Blue Book, published in 1928, which purports to give the price of ice for certain named southern States, including Oklahoma. We respectfully submit that this book should not be taken as authority as to the ice prices prevailing in the various States referred to therein, because labor and other conditions existing in the different States referred to might play a prominent part as to the price of ice, and we submit that the evidence in this case taken as a whole, shows a decline in the price of ice, improvement in the service, kind, quality and character of ice, after the passage of the act, and that the evils which the act sought to remedy have, in part at least, been remedied.

The court also, in the concluding part of the opinion,

casts doubt upon the right and power of the Corporation Commission of the State with reference to the regulation of the price of ice. We quote:

> "It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the business, we seriously doubt that the manufacture of ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory."

It was contended by the appellee in the Circuit Court of Appeals that said Ice Act was invalid for the reason that there existed no right of judicial review from the action of the Corporation Commission in granting or denying a permit or license to engage in the manufacture, sale and distribution of ice. Section 5 of said act provides:

> "That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the af-

fording of all reasonable conveniences, facilities and service as it may impose as to the transportation and transmission companies."

Section 18 of Article 9 of the State Constitution confers the power and authority upon said Commission as to the regulation and control of all transportation and transmission companies doing business within the State, and under said Section 5 of said Ice Act the same powers are conferred upon the Commission with reference to the ice business.

Section 20 of Article 9 of the Constitution provides for appeals from the Corporation Commission to the State Supreme Court as to transportation and transmission companies, and that no other court, except the Supreme Court by way of appeal, shall have jurisdiction to revise, reverse, correct or annul any action of the Commission within the scope of its authority. This article also provides that the Legislature may, by general laws, provide for appeal from any action of the Commission by the State, or by any person interested, irrespective of the amount involved.

The State Supreme Court, in the case of *Harris-Irby Cotton Co.* v. *State, supra,* held that an order made by the Corporation Commission as to prices for ginning cotton under the original Trust Act was not an appealable order, but the Supreme Court has never held that an appeal would not lie from any order of the Corporation Commission with reference to the ice business or the granting or denying

of a permit or license to manufacture, sell and distribute the same. In the case of *Pioneer Telephone & Telegraph Co.* v. *State*, 40 Okla. 417, 138 Pac. 1033, it was held:

> "Three remedies are available to the appellant by which the validity of said order might be challenged: (1) By appeal as provided in Section 20 of Article 9 (Section 238, Williams' Ann. Ed.) of the Constitution; (2) by application made directly to the Commission to set aside order (Section 18 of Article 9 [Section 234, Williams' Ann. Ed.] of the Constitution); and (3) by an action in equity to restrain its enforcement. As a matter of practice the first two remedies should be sought before the last remedy is resorted to. *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.
>
> "Section 6, Article 2 (Section 14, Williams' Ann. Ed.) of the Constitution of this State, provides that:
>
> " 'Courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.'
>
> "By this provision the right of the appellant to maintain a proceeding to invoke the equitable powers of a court to enjoin its enforcement is guaranteed. True, Section 20 of Article 9 provides that:
>
> " 'No court of this State (except the Supreme Court, by way of appeal as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or to suspend or delay the action or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties.'
>
> —but in view of the holding of the Supreme Court of

the United States in *Prentiss* v. *Atlantic Coast Line, supra,* this provision cannot be construed as denying the remedies guaranteed by Section 6 of the Bill of Rights.

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"Following the rule laid down in the Prentiss case, we have no other alternative than to hold that, by virtue of Section 6 of the Bill of Rights, the direct proceeding in a court exercising equity powers in the district and superior courts of this State was available to appellant to challenge the validity of the order."

We submit that under the authority of this case one aggrieved by the action of the Corporation Commission in granting or denying an application for a permit or license to engage in the ice business could appeal direct to the Supreme Court, or bring an action in equity in any court of record of the State to restrain the enforcement of the order complained of. See also, *Frost* v. *Corporation Commission*, 26 Fed. (2d) 508.

Section 6 of the Ice Act provides:

"All and any orders made by said Commission fixing rates, charges, rules and regulations as to any person, firm or corporation engaged in the manufacture, sale and distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma."

This provision may not be broad enough within itself to include the right of appeal from an order granting or denying a permit or license. Be this as it may, the right of appeal from such an order is not expressly denied under

the act, and we think such a right is granted by the Constitution itself under the rule announced in *Pioneer Telephone & Telegraph Co.* v. *State, supra.*

Prior to the opinion of this Court in the case of *Oklahoma Operating Co.* v. *Love, supra,* the State Legislature passed Chapter 52, Session Laws of Oklahoma, 1919, page 86 (Sections 11046-11050, Article 2, Chapter 60, Compiled Oklahoma Statutes, 1921), relating to procedure and appeals for violation of the Anti-Trust Laws. This statute was referred to by this Court in its opinion in the above case.

The Corporation Commission, in the performance of its functions, exercises judicial, executive and legislative powers. *Muskogee Gas & Electric Co.* v. *State,* 81 Okla. 176, 186 Pac. 730; *Pioneer Telephone & Telegraph Co.* v. *State,* 40 Okla. 417, 138 Pac. 1033, *supra; Frost* v. *Corporation Commission,* 26 Fed. (2d) 508, *supra.* We understand that the Corporation Commission, in denying or granting a license to manufacture, sell and distribute ice, acts in a quasi-judicial capacity, but in whatever capacity it may act, a judicial review is provided for under the Constitution and laws of the State.

The State statute (Chapter 176, Session Laws of Oklahoma, 1915; Sections 3712-3715, Compiled Oklahoma Statutes, 1921), declaring cotton gins to be public utilities, as before stated, is similar in its terms and provisions to the Ice Act. Section 5 of the Cotton Act is:

"The orders made by said Commission fixing rates, charges, rules and regulations as to any persons or corporation operating any gin or gins may be reviewed on appeal by the Supreme Court in the same manner, form, jurisdiction and procedure as applied to such orders made relative to transportation and transmission companies."

This section may be considered limited in its scope as to the right of appeal, and probably does not, by express terms, grant the right of appeal from an order granting or refusing a license, but the Supreme Court of the State has held that an appeal would lie from the order of the Commission refusing a permit. *Baker* v. *Capshaw*, 130 Okla. 86, 265 Pac. 115. Baker owned and operated a five-stand cotton gin at Hobart, Oklahoma; he desired to increase the capacity by adding four additional gin stands; he made application to the Commission for permission or license so to do, as provided for under the Cotton Gin Act. A hearing was had and the application was denied. He did not appeal, but sought a writ of prohibition. The writ was denied, and the Court, in the concluding part of the opinion, said:

"If plaintiff was not satisfied with the order of the Corporation Commission, his remedy clearly was by appeal."

See, also, *In re. Farmers Coöperative Gin Co.*, 122 Okla. 115, 251 Pac. 729.

Since the Supreme Court has definitely held that a right of appeal did exist from the order of the Corporation

Commission denying a permit under the Cotton Gin Act, we respectfully submit that it would hold that the appellee, if he had made an application for a license to manufacture, sell and distribute ice and his application had been denied, had the right of review by appeal to the Supreme Court.

On March 28, 1923, the State Legislature passed what is known as the Motor Vehicle Transportation Act, Chapter 113, Session Laws of Oklahoma, 1923, page 188. This act confers upon the Corporation Commission the power to grant permits or licenses upon a showing of public convenience and necessity therefor. No specific right of appeal is allowed, but the Supreme Court, in *Ex Parte Tindall*, 102 Okla. 192, 229 Pac. 125, held that the right of appeal existed. We quote:

> "Sections 18 and 19 of Article 9 of the Constitution specifically confer certain powers upon the Corporation Commission, and specifically authorize the Legislature to confer additional powers upon such Commission; and Section 20, *Id.*, grants an appeal from orders of the Corporation Commission to this Court, hence the provisions of an act conferring certain powers of the same nature and character as those specifically conferred by the Constitution itself are not rendered unconstitutional merely because the act fails to provide for an appeal, inasmuch as the right of appeal provided for in Section 20, Id., automatically vests in any party aggrieved by the enforcement of such power."

A right of judicial review certainly exists under the Constitution and laws of Oklahoma from an order of the

Corporation Commission denying or granting a permit for the manufacture, sale and distribution of ice, and the Ice Act is constitutional.

Wadley Southern Railway Co. v. *State of Georgia*, 235 U. S. 651, 59 L. ed. 405.

CONCLUSION

We respectfully submit: (1) that the manufacture, sale and distribution of ice is a public business affected with a public interest, and that the act of the Legislature of the State of Oklahoma approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma, 1925), is valid, and that the Circuit Court of Appeals erred in holding said act as being repugnant to the Constitution of the United States; and (2) that a right of judicial review exists under the Constitution and laws of the state from an order granting or refusing a permit for the manufacture, sale and distribution of ice and that the judgment and decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

ORIGINAL ACT. Effective June 10, 1908. Session Laws of Oklahoma, 1907-08, page 750.

TRUSTS

Defined and Regulated.

ARTICLE I.

An Act to define a trust, monopoly, unlawful combination in restrain of trade; to provide civil and criminal penalties and punishment for violation thereof and damages thereby caused; to regulate such trusts and monoplies; to promote free competition for all classes of business in the State; and declaring an emergency.

Be It Enacted by the People of the State of Oklahoma:

Section 1. That every act, agreement, contract or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal.

Section 2. If the Attorney-General shall have sufficient evidence that the provisions of the Constitution, or any law pursuant thereto against the establishment or maintenance of any trust, monopoly or unreasonable restraint of trade, or any violation of this Act, or any of its provisions, are about to be or have been violated by any person, firm, corporation or association engaged in any quasi-public business or having a virtual monopoly of any commodity or business with the intention or effect of destroying competition or restraining trade, contrary to the provisions of this Act, he may file information in the Supreme Court, and by proceeding as against nuisance, enjoin and restrain said combination or arrangement, or any of its members, or by a proceeding analogous to libel, cause any or all the personal property of said offending person, firm or corporation or association, used or to be used, in whole or in part, in any transaction which, in effect or in-

tent, hinders competition, or unreasonable restriction of trade, to be forfeited to the State in the discretion of the court, together with all the commodities in the possession or control of such offending corporation, person, firm or association, used or intended for such use in violation of the Constitution or laws pursuant thereto, or this Act, and may take both said proceedings. Upon the filing of such petition, or at any time thereafter, the Attorney-General may apply for an injunction pending the action, and the appointment of a receiver for any or all of the property of such person, firm, corporation or association. Upon such application, the court, or a majority of the judges thereof, if in vacation, is authorized to issue a restraining order pending the action, enjoining the defendant or defendants from in any way changing the business, records, books, instruments or property to them belonging, or by them used, directly or indirectly, and issue a rule to show cause why a receiver should not be appointed, and after notice of such rule shall have been served on the defendant or defendants or any managing agent of said defendant or defendants within the State, and an opportunity to be heard having been given, said receiver may be appointed in the discretion of the court, to take charge of the property of the defendant or defendants so notified.

Such receiver shall preserve said property free from any illegal arrangement until the termination of the litigation, and thereafter to dispose of the same according to law, or any other remedy may be applied, or both, to more effectually produce and consummate such preservation or forfeiture or both; and said court shall be authorized by appointed master in chancery, or otherwise, in its discretion, to receive evidence in any county in the State, according to the rules of civil procedure, and make findings of fact thereon for said court; and said master in chancery shall have compulsory process for witnesses, and the production of books and papers from any part of the State, and for this purpose the executive officers of the said court, or any of the district courts of this State, shall be empowered to serve mense and final process; and the services

of said master in chancery, or other person appointed by the court, shall be paid for as costs by the losing parties in said cause, in an amount equal to the fees that would have been earned therein if a notary public had received said testimony, together with a sum of not exceeding ten dollars ($10.00) per day, in the discretion of the court, and the actual expenses for each day that testimony is actually received, and testimony and evidence in such action may also be taken by deposition anywhere within or without this State, as in civil actions in the district court. In the event of a violation of any order of the court therein, and a proceeding grows out of the same in the nature of contempt, if the defendant demand a trial by jury, the court may transfer the said contempt proceedings to any district court of the State for trial by jury and a verdict, but the judgment, if any, shall be rendered by said Supreme Court, and sentence, if proper, passed by it. This proceeding shall be in addition to, and cumulative as to any other provisions of the law applicable to the same situation.

Provided, that the appointment of such receiver may be stayed, or after appointment and possession taken the receiver shall be discharged, upon the defendant giving bond in an amount, and with the sureties to be approved by said court or a justice thereof, conditioned for the payment of all damages and costs which may be assessed against the defendant in said proceeding in favor of the State, or any officer or person.

Section 3. Any person, firm, corporation or association, who shall be injured in his or their business or property by any other person, firm, corporation or association, by reason of anything forbidden, or declared to be unlawful by this Act, may sue therefor in the courts of this State, and shall recover threefold the damages by him or them sustained, and the cost of suit, and a reasonable attorney's fee, to be fixed by the court.

Section 4. Every foreign corporation, as well as every foreign association exercising any of the powers, franchises or functions of a corporation in this State, vio-

lating any of the provisions of this Act, is hereby denied the right and prohibited from doing business in this State, and the Secretary of State, upon the order of the Corporation Commission, or any competent court, made after due notice and in due course of law, shall revoke the license of any such corporation or association heretofore authorized to do business in this State.

Section 5. It shall be unlawful for any person, firm, corporation or association engaged in the production, manufacture, distribution or sale of any commodity of general use, or rendering any service to the public, to discriminate between different persons, firms, associations or corporations, or different sections, communities or cities of the State by selling such commodity, or rendering such service at a lower rate in one section, community, or city than another, or at the same rate or price at a point away from that of production or manufacture as at the place of production or manufacture, after making due allowance for the difference, if any, in the grade, quantity or quality, and in the actual cost of transportation from the point of production or manufacture, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition, or restriction of trade.

Section 6. Any person who shall violate any of the provisions of this Act, or take part, or aid, or advise in the violation of any such provisions, or who shall, as officer, manager, director, agent, servant or employe of any firm, corporation or association, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information, knowingly, to assist in carrying out such purposes, or in pursuance thereof, in violation of said provisions, shall be punished by a fine of not less than fifty dollars, nor more than ten thousand dollars, and by imprisonment not less than ten days, nor more than ten years, at the discretion of the court; and each day's violation of the provisions, or any of them, of this Act, shall constitute a separate offense. And any sum which might be assessed as a fine by way of punishment for a crime as in this Act provided, may be recovered by the State as a penalty in civil

action in addition to, or irrespective of, the assessment and assessability of said fine, either before, after, or simultaneously with the pendency of said criminal action.

Section 7. In any indictment or information for any offense named in this Act, it is sufficient to state the purpose or facts of the trust, monopoly, unlawful combination in restraint of trade or commerce, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purpose without giving its name, or description, or stating how, when and where it was created.

Section 8. It shall be the duty of the court before whom any proceeding under this Act may be brought, upon the application of the Attorney-General, to cause to be issued by the clerk of said court subpoenas for such witnesses as may be named in the application, and cause the same to be served by the sheriff of the county where or whither such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge, at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this Act; and any witness who fails or refuses to attend and testify shall be punished for contempt, as provided by law. Any person so subpoenaed and examined, shall not be liable to criminal prosecution for any violation of this Act about which he may testify, neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all the witnesses shall, at the option of the Attorney-General, be taken down and shall be transcribed and placed in the hands of the Attorney-General, and he shall be authorized to prosecute such violator or violators of this Act as the testimony so taken shall disclose. Witnesses subpoenaed as provided in this Act, shall be compelled to attend from any county in the State.

Section 9. It shall be the duty of the county attorney of the several counties of this State, as well as the Attorney-General of the State, to prosecute all actions to enforce the criminal provisions of this Act.

Section 10. It shall be unlawful for any person, partnership, firm, association, corporation or joint stock company, or agent thereof, to issue, or to own, trust certificates, or for any person, firm, partnership, association, joint stock company or corporation, agent, officer, employe, or the director or stockholders of any corporation, association or joint stock company to enter into any combination, contract or agreement with any person or persons, corporations or associations, firm or firms, partnership or partnerships, or with any stockholder, director or officer, agent or employe of the same, the purpose or effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the conduct or operation of the same, or the output or manufactured product thereof, or the marketing of the same in the hands of any trust or trustees, holding corporation or association, firm or committee, with the intent or effect to limit or fix the price, or lessen the production or sale of any product or article of commerce, or the use or consumption of the same, or to prevent, restrict, limit or diminish the manufacture or output of any such article of commerce, use or consumption, and every person, firm, partnership, association, joint stock company or corporation, or any agent, employe, officer or director of the same, that shall enter into any such combination, contract, management or agreement for the purpose aforesaid, shall be deemed and adjudged guilty of conspiracy in restraint of trade, and punished as provided for in Section 6 of this Act, insofar as applicable, provided, this section shall not be construed to extend beyond the scope and meaning of Section 1 of this Act.

Section 11. Every corporation who shall own, hold or control, in any manner whatever, the stock of any competitive corporation or corporations engaged in the same kind of business, in or out of this State, in violation of the Constitution and laws of this State, shall forfeit its charter or license to do business in this State, and shall be subject to a penalty of not less than one thousand dollars, nor

more than ten thousand dollars, to be recovered at the suit of the State in any court of competent jurisdiction.

Section 12. Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State shall violate any law of this State, for the violation of which fines, penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may hereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties, and for all costs of suit, and of collection. The State of Oklahoma shall have a lien on all such property from the date that suit shall be instituted by the Attorney-General in any court of competent jurisdiction within this State for the purpose of forfeiting charter or cancelling the permit of such corporation, or for the recovery of such fines or penalties, the institution of such suit for the recovery of such fines, penalties or forfeitures shall constitute notice of such lien.

Section 13. Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this Act, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.

Section 14. In all prosecutions or proceedings under

this Act, it shall be sufficient to prove that a trust, monopoly, combination in restraint of trade or commerce existed without the period not barred by the statute of limitations, and was continued in any form into and during any portion of the period not so barred, and that the defendant belonged to it, or acted for or in connection with it without proving all the members belonging to it, or proving or producing any article or agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

Section 15. Any violation of this Act, committed before its passage, and continued in any illegal form after its passage, is within its terms.

Section 16. The remedies provided by this Act are applicable to all pending actions.

Section 17. Nothing in this Act shall abridge or alter any remedy or remedies now or hereafter existing, either at common law or by statute, but the provisions of this Act are in addition to such remedies.

Section 18. An emergency is hereby declared to exist for the passage of this Act, for the preservation of the public safety of this State, and this Act shall be in force and effect from and after its passage and approval.

Approved June 10, 1908.

Chapter 90, Compiled Oklahoma Statutes 1921.
Sections 11017-11035.

TRUSTS AND POOLS.

CHAPTER 90.

Article I. Combinations in Restraint of Trade — In General.

ARTICLE I.

Combinations in Restraint of Trade—In General.

11017. Trust Declared Illegal. Every act, agreement, contract or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal.

11018. Duty of Attorney-General. If the Attorney General shall have sufficient evidence that the provisions of the Constitution or any law pursuant thereto, against the establishment or maintenance of any trust, monopoly or unreasonable restraint of trade, or any of the provisions of this article, are about to be or have been violated by any person, firm, corporation or association engaged in any quasi-public business or having a virtual monopoly of any commodity or business, with the intention or effect of destroying competition or restraining trade, contrary to the provisions of this article, he may file information in the Supreme Court, and by proceeding as against nuisance, enjoin and restrain said combination or arrangement, or any of its members, or by a proceeding analogous to libel, cause any or all the personal property of said offending person, firm or corporation or association, used or to be used, in whole or in part, in any transaction which, in effect or intent, hinders competition, or produces unreasonable restriction of trade, to be forfeited to the State, in the discretion of the court, together with all the commodities in the possession or control of such offending corporation, person, firm or association, used or intended for such use in violation of the Constitution or laws pursuant thereto, or this article; and he may take both said proceedings.

11019. Same—Restraining Order—Receiver. Upon the filing of such petition, or at any time thereafter, the Attorney-General may apply for an injunction pending the action, and the appointment of a receiver for any or all of the property of such person, firm, corporation or association. Upon such application, the court, or a majority of the justices thereof, if in vacation, is authorized to issue a restraining order pending the action, enjoining the defendant from changing in any way the business, records, books,

instruments or property to them belonging, or by them used, directly or indirectly, and to issue a rule to show cause why a receiver should not be appointed, and after notice of such rule shall have been served on the defendant or defendants or any managing agent of said defendant or defendants within this State, and an opportunity to be heard having been given, said receiver may be appointed in the discretion of the court, to take charge of the property of the defendant or defendants so notified.

11020. Duty of Receiver — Evidence. Such receiver shall preserve said property free from any illegal arrangement until the termination of the litigation, and thereafter dispose of the same according to law; or any other remedy may be applied or both, more effectually to produce and consummate such preservation or forfeiture or both; and said court shall be authorized by appointed master in chancery, or otherwise, in its discretion, to receive evidence in any county in the State, according to the rules of civil procedure, and have findings of fact made thereon for said court; and said master in chancery shall have compulsory process for witnesses and the production of books and papers from any part of the State, and for this purpose the executive officers of the said court, or any of the district courts of this State, shall be empowered to serve mesne and final process; and the services of said master in chancery, or other person appointed by the court, shall be paid for as costs by the losing parties in said cause, in an amount equal to the fees that would have been earned therein if a notary public had received said testimony, together with a sum of not exceeding ten dollars per day, in the discretion of the court, and the actual expenses for each day that testimony is actually received; and testimony and evidence in such action may also be taken by deposition anywhere within or without this State, as in civil actions in the district court. In the event of a violation of any order of the court therein, and a proceeding grows out of the same in the nature of contempt, if the defendant demand a trial by jury, the court may transfer the said contempt proceedings to any district court of the State for trial by jury and a verdict;

but the judgment, if any, shall be rendered by said Supreme Court, and sentence, if proper, passed by it. This proceeding shall be in addition to, and cumulative as to any other provisions of the law applicable to the same situation.

11021. Stay Bond. The appointment of such receiver may be stayed, or, after appointment and possession taken, the receiver shall be discharged, upon the defendant giving bond in an amount and with sureties to be approved by said court or a justice thereof, conditioned for the payment of all damages and costs which may be assessed against the defendant in said proceeding in favor of the State, or any officer or person.

11022. Recourse of Injured Parties. Any person, firm, corporation or association, who shall be injured in his business or property by any other person, firm, corporation or association, by reason of anything forbidden, or declared to be unlawful by this article, may sue therefor in the courts of this State, and shall recover threefold the damages by him sustained, and the cost of suit, and a reasonable attorney's fee, to be fixed by the court.

11023. Foreign Corporations Forfeit License by Violation. Every foreign corporation, as well as every foreign association exercising any of the powers, franchises or functions of a corporation in this State, violating any of the provisions of this article, is hereby denied the right and prohibited from doing business in this State, and the Secretary of State, upon the order of the Corporation Commission, or any competent court, made after due notice and in due course of law, shall revoke the license of any such corporation or association heretofore authorized to do business in this State.

11024. Discrimination Unlawful. It shall be unlawful for any person, firm, corporation or association engaged in the production, manufacture, distribution or sale of any commodity of general use, or rendering any service to the public, to discriminate between different persons, firms, associations or corporations, or different sections, communi-

ties of cities of the State by selling such commodity, or rendering such service at a lower rate in one section, community or city than another, or at the same rate or price at a point away from that of production or manufacture as at the place of production or manufacture, after making due allowance for the difference, if any, in the grade, quantity or quality, and in the actual cost of transportation from the point of production or manufacture, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition, or restriction of trade.

11025. Penalty and Recovery. Any person who shall violate any of the provisions of this article, or take part, or aid, or advise in any such violation, or who shall, as officer, manager, director, agent, servant or employe of any firm, corporation or association, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information, knowingly, to assist in carrying out such purposes, or in pursuance thereof, in violation of said provisions, shall be punished by a fine of not less than fifty dollars, nor more than ten thousand dollars, and by imprisonment not less than ten days nor more than ten years, at the discretion of the court; and each day's violation of any of the provisions of this article shall constitute a separate offense. And any sum which might be assessed as a fine by way of punishment for a crime, as herein provided, may be recovered by the State as a penalty in civil action in addition to, or irrespective of, the assessment and assessibility of said fine, either before, after, or simultaneously with the pendency of said criminal action.

11026. Indictment or Information Shall State What. In any indictment or information for any offense named in this article, it is sufficient to state the purpose or facts of the trust, monopoly or unlawful combination in restraint of trade or commerce, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purpose, without giving its name, or description, or stating how, when or where it was created.

11027. Witnesses. It shall be the duty of the court

before whom any proceeding under this article may be brought, upon the application of the Attorney-General, to cause to be issued by the clerk of said court subjoenas for such witnesses as may be named in the application, and cause the same to be served by the sheriff of the county where or whither such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge, at the time and place se forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this article; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person so subpoenaed and examined, shall not be liable to criminal prosecution for any violation of this artice about which he may testify, neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all the witnesses shall, at the option of the Attorney-General, be taken down and shall be transcribed and placed in the hands of the Attorney-General, and he shall be authorized to prosecute such violator or violators of this article as the testimony so taken shall disclose. Witnesses subpoenaed as provided in this act (article) shall be compelled to attend from any county in the State.

11028. County Attorneys to Prosecute. It shall be the duty of the county attorneys of the several counties of this State, as well as the Attorney-General of the State, to prosecute all actions to enforce the criminal provisions of this article.

11029. Combinations in Restraint of Trade Unlawful. It shall be unlawful for any person, partnership, firm, association, corporation or joint stock company, or agent thereof, to issue, or to own, trust certificates, or for any person, firm, partnership, association, joint stock company or corporation, agent, officer, employe, or the director or stockholders of any corporation, association or joint stock company, to enter into any combination, contract or agreement with any person, corporation or association, firm or

partnership, or with any stockholder, director or officer, agent or employe of the same, the purpose or effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the conduct or operation of the same, or the output or manufactured product thereof, or the marketing of the same, in the hands of any trust or trustee, holding corporation or association, firm or committee, with the intent or effect to limit or fix the price, or lessen the production or sale of any product or article of commerce, or the use or consumption of the same, or to prevent, restrict, limit or diminish the manufacture or output of any such article of commerce, use or consumption; and every person, firm, partnership, association, joint stock company or corporation, or any agent, employe, officer or director of the same, that shall enter into any such combination, contract, management or agreement for the purpose aforesaid, shall be deemed and adjudged guilty of conspiracy in restraint of trade, and punished as provided for in Section 11025, insofar as applicable: Provided, that this section shall not be construed to extend beyond the scope and meaning of the first section of this article.

11033. Penalty for Corporation Owning Stock of Competitor. Every corporation which shall own, hold or control, in any manner whatever, the stock of any competitive corporation or corporations engaged in the same kind of business in or out of this State, in violation of the Constitution and laws of this State, shall forfeit its charter or license to do business in this State, and shall be subject to a penalty of not less than one thousand dollars, nor more than ten thousand dollars, to be recovered at the suit of the State in any court of competent jurisdiction.

11034. State to Have Lien on Property of Law-Breaking Corporation. Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State, shall violate any law of this State, for the violation of which fines, penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which

may hereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties, and for all costs of suit, and of collection. The State of Oklahoma shall have a lien on all property from the date that suit shall be instituted by the Attorney-General in any court of competent jurisdiction within this State for the purpose of forfeiting the charter or cancelling the permit of such corporation, or for the recovery of such fines or penalties; the institution of such suit for the recovery of such fines, penalties or forfeitures shall constitute notice of such lien.

11032. Public Business Defined. Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.

11033. Proof Required. In all prosecutions or proceedings under this article, it shall be sufficient to prove that a trust, monopoly, combination in restraint of trade or commerce existed without the period not barred by the statute of limitations, and was continued in any form into and during any portion of the period not so barred, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or prov-

ing or producing any article or agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

11034. Previous and Continuing Violations Included. Any violation of this article committed before its passage, and continued in any illegal form after its passage, is within its terms.

11035. Remedies Additional to Former Remedies. Nothing in this article shall abridge or alter any remedy now existing, either at common law or by statute, but the provisions of this article are in addition to such remedies.

Ice Permit of Appellant for 1930-1931.

No. 925.

Great Seal of the State of
Oklahoma 1907

State of Oklahoma Corporation Commission

Ice License.

Manufacture, Sale and Distribution.

Know All Men by These Presents: That New State Ice Company of Oklahoma City, a Company, having filed application for license to manufacture, distribute, and sell ice in the State of Oklahoma, at Oklahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1925.

That said New State Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Oklahoma at Oklahoma City, from July 1 1930, to June 30, 1931, inclusive.

In Witness Whereof, the Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary, and its Seal affixed thereto, this 30th day of June, 1930.

Corporation Commission,

C. C. Childers, Chairman.

Attest:

Ed. Hicks, Jr., Asst. Secretary.

(Seal of Corporation Commission of Oklahoma)

Ice Permit of Appellant for 1931-1932.

No. 1146.

Great Seal of the State of Oklahoma 1907

State of Oklahoma Corporation Commission

Ice License.

Manufacture, Sale and Distribution.

Know All Men by These Presents: That New State Ice Company of Oklahoma City, Oklahoma, a Company, having filed application for license to manufacture, distribute, and sell ice in the State of Oklahoma, at Oklahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1925.

That said New State Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Oklahoma at Oklahoma City, Oklahoma, from July 1, 1931, to June 30, 1932, inclusive.

In Witness Whereof, the Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary, and its Seal affixed thereto, this 10th day of July, 1931.

Corporation Commission,

Paul A. Walker, Chairman.

Attest:

Ed. Hicks, Jr., Asst. Secretary.

(Seal of Corporation Commission of Oklahoma)